

No. 787.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

E. F. WILCOX,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

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Solicitors for Plaintiff in Error.

Upon Writ of Error to the Circuit Court of the United States for the
Southern District of California, in and for
the Northern Division.

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Brief on Behalf of
Plaintiffs in
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STATEMENT OF THE CASE.

Lieut. E. F. Wilcox, now Captain Wilcox, filed a claim in the Third Auditor's office (now the office of the Auditor of the Interior Department), on April 25th, 1889, for two hundred dollars the value of a horse belonging to him and alleged to have been killed in the military service of the United States on April 6, 1889. Settlement of the claim was made by the Auditor for the War Department on December 7, 1896. The draft was issued for the amount allowed on December 14, 1897. On May 28, 1897, the Comptroller of the Treasury revised said account, on his own motion, and disallowed the amount which had been allowed by the Auditor, for reasons stated as follows:

“Value of a horse whose leg was broken by a kick of one of the horses in a corral into which the horse was turned. The horse was shot by order of claimant, \$200.00. On this case the Quartermaster General reports: ‘It was not necessary that the horse should have been turned into a corral with a lot of public horses, where any horse was liable to be hurt as was this one. If the claimant assumed the risk of turning his horse, especially one valued at one thousand dollars, in a corral among a number of Government horses, it is thought the claimant assumed the risk, and that the loss arose not without fault on the part of the claimant.’ This is a case of contributory negligence on the part of the claimant, and he is not entitled to recover under the Act of March 3, 1885. 23 Stats. at Large, page 350.”

On May 24, 1898, the Auditor for the War Department, by direction of the Comptroller, re-stated said account, and raised the charge of two hundred dollars against the claimant. On August 8, 1900, the United States, by the United States Attorney for the Southern District of California, filed an action at law in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Northern Division, to recover the two hundred dollars charged against Captain Wilcox. (Record 5.) The defendant demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. (Record 11.) The court on the hearing sustained the demurrer and dismissed the case. (Record 12), and thereafter rendered judgment in favor of the defendant. (Record 13.)

SPECIFICATION OF ERRORS.

The Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, erred in sustaining the defendant's demurrer to plaintiff's complaint. (Record 17.)

POINTS AND AUTHORITIES.

THE COMPTROLLER OF THE TREASURY HAD THE AUTHORITY TO RE-STATE THE ACCOUNT AND RAISE THE CHARGE AGAINST THE CLAIMANT, IF DONE WITHIN A YEAR AFTER SETTLEMENT BY THE AUDITOR.

The act of March 3, 1885, (23 Stats. at Large, p. 350.) provides:

“That the proper accounting officers of the treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which have been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:

“First. When such loss or destruction was without fault or negligence on the part of the claimant.

“Second. * * * *

“Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided* That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be re-opened or considered: *And provided further*, That the liability of the government under this act shall be limited to such articles of personal property as the secretary of war, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further*, That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction.”

At the time of the passage of this act, the "proper accounting officers of the treasury," authorized and directed to settle claims arising under the act, were the Third Auditor, and the Second Comptroller. Paragraph 3, of Section 277, Revised Statutes provides :

"The Third Auditor shall receive and examine all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other modes of transportation, in the service of the United States by contract or impressment; and, after the examination of such accounts he shall certify the balances and shall transmit such accounts, with all the vouchers and papers and the certificate, to the Second Comptroller for his decision thereon."

Section 273, Revised Statutes, in part provides :

"It shall be the duty of the Second Comptroller :

"First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred."

Sec. 191, Revised Statutes, is as follows :

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

Under Section 277, Revised Statutes, the Third Auditor had primary jurisdiction over claims or accounts arising under the Act of 1885, it being his duty to examine said claims, and certify his action thereon to the Second Comptroller, for losses provision for the payment of which is made by Section 273, Revised Statutes, and the decision of the Second Comptroller was made final and conclusive by Section 191 Revised Statutes.

The first provision of the Act of 1885, *supra*, reading,

“That any claim which shall be presented and acted on under authority of this act, shall be held as finally determined, and shall never thereafter be re-opened or considered,”

—must be read in the light of the law found in Sections 277, 273, and 191, Revised Statutes, which made the action of the Second Comptroller final, and whose action

“shall never thereafter be re-opened or considered.”

Section 24 of the Act of July 31, 1894 (28 Stats. at Large, p. 211,) provides:

“The provisions of sections three to twenty-three inclusive of this act shall be in force on and after the first day of October, eighteen hundred and ninety-four.”

Section 4 of the act abolished the offices of Second Comptroller and Commissioner of Customs, and declared that:

“The *First* Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury.”

Section 3 of the act changes the designations of the different Auditors so as to correspond with the names of the different

departments of the Government. Under paragraph "Second" of Section 7, the Auditor for the War Department was given jurisdiction over all accounts, etc., arising in or under the War Department. It thus became his duty to examine and settle claims arising under the act of 1885, *supra*.

We now come to section 8 of the act of 1894, page 207, which provides:

"The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, *except*, that any person whose account may have been settled, the head of any Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, that the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account."

From Section 8 it clearly appears that the action of the Auditor for the War Department is final and conclusive *unless*, and only *unless* and within a year from the date of the Auditor's settlement, the account shall be revised by the Comptroller of the Treasury, upon the application of the claimant, the Secretary of War (in this case), the Secretary of the Treasury, or by the Comptroller of the Treasury upon his own motion. Had the Auditor's action been unsatisfactory to the claimant, the latter would have had the right to demand a revision by the Comptroller. The Comptroller had the same right to revise the account of his own motion. The action of the Comptroller in such a case is in no proper sense a re-open-

ing of a settled account because the action of the Auditor was only tentative, and would not become final until the lapse of a year from the date of said action. This section makes the decision of the Comptroller final and conclusive as to those accounts revised by him.

The second paragraph of Section 8 provides :

“Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the division of Bookkeeping and Warrants.”

It will be seen that the Comptroller had authority of law to revise this account which he did within a year, and it then became the duty of the Auditor, under the second paragraph of Section 8, quoted, to re-state the account in accordance with the findings of the Comptroller as per his statement of differences. The Comptroller had the right, and it was his duty, to pass upon the evidence submitted to the Auditor, and, if the former was of opinion that said evidence failed to sustain the claim, to disallow it.

THE ACCOUNT WAS NEVER SO FINALLY DETERMINED AS TO COME WITHIN THE PROVISIONS OF THE ACT OF 1885, AND THE STATUTES THEN IN FORCE.

Should it be contended, however, that the claim of Captain Wilcox should have been settled and allowed under the Act of 1885 and the statutes then in force, then we contend it should have been passed upon and allowed by the Comptroller

of the Treasury before it was so finally settled and allowed as to bring it within the first proviso of the act of 1885 and the statutes then in force.

It will be remembered that, under the act of 1885, the *proper accounting officers of the Treasury* are authorized and directed to examine into, ascertain and determine the value of the private property belonging to officers and men in the military service which may have been lost or destroyed in such service, and the first proviso of the act of 1885 is as follows:

"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined and shall never thereafter be re-opened or considered."

"Proper accounting officers" for claims of this character were, under the act of 1885 and the statutes then in force, those designated in paragraph 3 of Section 277, Section 273, and Section 191 of the Revised Statutes.

By paragraph 3 of said Section 277 the Third Auditor was authorized, among other things, to receive and examine all accounts arising under the provisions of the act of 1885. By Section 273 the Second Comptroller examined all accounts settled by the Third Auditor and certified the balances arising thereon to the Secretary of War Department. And Section 191, Revised Statutes, provided that the determination of the *Second Comptroller* should be final and conclusive upon the executive branch of the government and subject only to revision by congress or the proper courts. Hence, to make the determination of any such claim final, it was necessary that it be passed upon by the Second Comptroller.

The act of 1894 dispensed with the office of Third Auditor and imposed such duties theretofore appertaining to that office

and relating to the War Department, on the Auditor for the War Department, and also dispensed with the office of Second Comptroller and imposed the duties theretofore appertaining to that office upon the Comptroller of the Treasury. The claim in question was never settled by the Third Auditor nor by the Second Comptroller. It was, however, on December 7, 1896, settled by the Auditor for the War Department.

Pursuant to the provisions of Section 191, Revised Statutes, and the act of 1885, it was the duty of the Second Comptroller (now Comptroller of the Treasury) to examine said account after the same had been settled by the Third Auditor. This was not done; but the claim, upon being settled by the Auditor for the War Department (3d Auditor), was immediately paid without any action having been taken thereon by the Comptroller of the Treasury (2d Comptroller). Therefore, when this claim was settled and allowed by the Auditor for the War Department and was thereafter paid, it was not so finally settled and allowed as to bring it within the meaning of the said first proviso of the act of 1885, *supra*, and the money paid to the claimant was an unauthorized payment under misconstruction of law; because under Section 191, Revised Statutes, the claim must have been settled and allowed by the Comptroller of the Treasury (2d Comptroller), and the action of the Auditor was not such a final settlement as is required by the Act of 1885, *supra* and the provisions of Section 191, Revised Statutes.

U. S. v. Windom. 137 U. S. 636.

The claimant has thus received money from the United States which he is not legally entitled to retain, and it may

be recovered back in a suit at law, under authority of the decision of the Supreme Court of the United States in the case of Wisconsin Central Ry. Co. v. U. S., 164 U. S. 190, wherein it was held (quoting from the syllabi) :

“The government is not bound by the act of its officers making an unauthorized payment under misconstruction of the law, and parties receiving moneys illegally paid by a public officer are liable *ex acquo et bono* to refund them.”

Mc. Elrath v. U. S., 102 U. S. 426.

U. S. v. Buschard, 125 U. S. 176.

U. S. v. Saunders, 79 Fed. 407.

The law prescribes what claims shall be paid (Act of 1885, *supra*) and if the disbursing officers of the government allowed and paid a claim which was not authorized by the law, the government is not bound by such action of its officers, but may go behind such decision and recover the money.

In the case of McElrath v. U. S., 102 U. S. 426, the court held (quoting from the syllabus) :

“5. A claimant received from the government the amount ascertained by the proper accounting officers to be due him, protesting at the time that he was entitled to a larger sum, and announcing his purpose not to be bound by such settlement of his accounts. He then sued the government for the additional amount claimed by him. Held; that the government was entitled to go behind the settlement of its accounting officers and reclaim any sum which had been improperly allowed the claimant in such settlement.”

And in the case of U. S. v. Buschard, 125 U. S. 176, the court say :

“This is a case where the disbursing officers supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have over-paid him. Certainly under such circumstances the mistake may be corrected.”

The court in the case of U. S. v. Saunders, 79 Fed. 407, held, (quoting from syllabus) :

“The rule applied that the United States have the right to recover money paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex aequo et bono*.”

The decisions above quoted are sustained and upheld by the later decision of the court in the case of Wisconsin Central R. R. Co. v. U. S., 164 U. S. 190, wherein it was held :

“The government is not bound by the act of its officers making an unauthorized payment under misconstruction of the law.” And

“parties receiving moneys illegally paid by a public officer are “liable *ex aequo et bono* to refund them.”

In conclusion, it is submitted that the decree of the court below sustaining defendant’s demurrer should be reversed and the case remanded with instructions to overrule the demurrer.

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